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Office of Administrative Law Judges
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Issue Date: 10 February 2004

CASE NO.: 2003-LHC-1072

OWCP NO.: 07-151606

IN THE MATTER OF:

TROY JUNIOR,
Claimant

v.

L&M BARGE CLEANING,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier

APPEARANCES:

Greg Unger, Esq.,
On behalf of Claimant

Travis R. LeBleu, Esq.,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Troy Junior

(Claimant), against L&M Barge Cleaning (Employer) and Louisiana Workers' Compensation Corporation (Carrier). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on September 16, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called Mr. John Exner, and introduced seventeen exhibits, which were admitted, including: medical records of Drs. Crotty, Grimm and Steck; various filings with the Department of Labor; diagnostic studies records; Claimant's employment application and earnings records with Employer; earnings documentation from the Social Security Administration; Employer's response to interrogatories; and test documentation and results from Allen Crane.[1] Employer introduced six exhibits, which were admitted, including: Claimant's deposition; medical records and deposition of Dr. Steck; Social Security Administration records; and the deposition and vocational rehabilitation records of Allen Crane.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant sustained an injury on December 11, 1998;

2. Claimant's injury was in the course and scope of his employment;

3. An employer-employee relationship existed at the time of Claimant's injury;

4. Employer was advised of the injuries on December 11, 1998;

5. An informal conference was held on September 19, 2002;

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__.

[2] Claimant submitted a 12 page, double spaced brief on November 14, 2003. Employer submitted a 7 page, double spaced brief on November 17, 2003.

6. Claimant's average weekly wage at the time of injury was $303.00;

7. Employer paid temporary total benefits from December 11, 1998, through June 20, 2000, totaling $17,372.93;

8. Employer has paid Claimant's medical bills;

9. Claimant suffers an estimated 9% permanent disability; and

10. Claimant is not physically able to return to his pre-accident employment.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Extent of Claimant's injury;

2. Claimant's choice of orthopedic surgeon[3]; and

3. Existence of suitable alternative employment.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 38-year old male who began working for Employer as a barge cleaner on November 30, 1998. On December 11, 1998, he fell from a ladder while cleaning a barge. He was taken to St. Charles General Hospital before being transferred to West Jefferson Hospital. Claimant presented with an open fracture to his right wrist and a fractured pelvis. On December 11, 1998, Dr. Grimm performed surgery on his wrist and Dr. Steck performed surgery on his pelvis. Both surgeries were successful. Claimant also presented with complaints of low back pain and bilateral foot numbness; a lumbar MRI revealed a burst fracture at L1 and a widened S1 joint. Dr. Steck performed

[3] Claimant's choice of physician was listed in the Pre-Hearing Statement, but not developed during the hearing or in the parties' Post-Hearing Briefs. There is insufficient evidence in the record to support any decision on this issue; therefore, it is not addressed herein.

a decompression and stabilization of Claimant's lumbar spine on December 23, 1998. Claimant recovered from his surgeries well, and was discharged from the hospital on January 15, 1999.

With respect to Claimant's wrist injury, Dr. Grimm noted at Claimant's February 19 and March 19, 1999 follow-up appointments, that his range of motion was improving. Dr. Grimm prescribed physical therapy and on May 28, 1999, he opined Claimant would not be able to return to heavy duty work. On June 18, 1999, Dr. Grimm opined Claimant reached MMI with regard to his wrist injury. However, Claimant returned on September 27 and October 28, 1999, complaining of intermittent wrist pain, which Dr. Grimm attributed to the metal wrist plate. In a letter to Employer dated July 5, 2000, Dr. Grimm stated Claimant had about a 9% impairment to his upper extremity. Claimant returned to Dr. Grimm again on June 27, 2001, with complaints of wrist pain and swelling. Dr. Grimm removed the hardware from Claimant's wrist on July 13, 2001, and found Claimant reached MMI in his wrist on August 22, 2001. At Claimant's October 7, 2003, follow up appointment, Dr. Grimm noted he had healed nicely and assigned him an 11% impairment rating to the upper extremity.

With respect to his back injury, Claimant followed up with Dr. Steck on January 28, April 14, and July 15, 1999. Dr. Steck noted Claimant's strength was improving as was his neurological condition. X-rays taken on April 14, 1999, indicated the spinal fracture was healing well. At Claimant's January 7, 2000 follow-up appointment, x-rays showed a solid spinal fusion, but Dr. Steck opined Claimant would not be able to return to his job cleaning barges and recommended vocational rehabilitation. On November 6, 2000, Claimant returned with complaints of back pain centered below the fusion. An MRI revealed the previous L1 burst healed with slight kyphosis, a forward angulation of the spine which is attributable to pain. On November 27, 2000, Dr. Steck diagnosed Claimant with a healed lumbar injury with persistent neurological dysfunction and opined he had reached MMI at this point in time. At Claimant's July 2, 2001 follow-up appointment, Dr. Steck noted he had normal strength, reflexes and sensory abilities, despite complaints of increasing pain. An MRI taken July 6, 2001, indicated Claimant had healed completely. Claimant returned for a follow-up on December 6, 2001, at which time Dr. Steck did not notice any neurological deficiencies. On February 22, 2002, Dr. Steck opined Claimant was significantly permanently disabled as a result of his lumbar fracture and subsequent spinal cord injury. He found Claimant to be neurologically sound and improving overall at each of his follow-up appointments on April 29, 2002, November 12, 2002, and July 17, 2003.

Claimant has a limited education with past work limited to unskilled and semi-skilled jobs as a rigger helper, pipe cleaner, car washer and as a construction worker before his work at Employer. Employer voluntarily paid Claimant temporary total disability starting on the date of his accident. In the spring of 2000, it hired vocational specialist Alan Crane who conducted a vocational assessment of Claimant on March 10,

2000, and sent Claimant for a Functional Capacity Evaluation on April 5, 2000. Based on the results of these evaluations, Crane found alternative jobs for Claimant as a production worker, housekeeper, courier and inventory counter. Claimant did not apply for the positions found by Employer.

B. Claimant's Testimony

Claimant testified he started working for Employer on November 30, 1998, washing and cleaning barges, being paid at least $8 per barge with a guarantee of 6 barges per day. This was the first time Claimant worked as a barge cleaner; his brothers worked with him at Employer. (Tr. 25; EX 1, pp. 15-19). Prior to his employment there, Claimant worked in commercial construction for T.L. James; hooked and cleaned pipes for a few months at AC Price; was a rigger helper at International Consulting; and worked at Benson Acura as a car washer. He worked lots of other places, but could not remember where. These jobs were all 5-6 months long, although he testified he worked as a rigger helper at International on and off for three years. (Tr. 25-27; EX 1, pp. 11-14). Claimant has a ninth-grade education, but cannot read or write and does not have any math skills; he was in special education classes before he quit school. (Tr. 27-28). Claimant also testified his driver's license was suspended secondary to unpaid speeding tickets and being caught driving without a license. On cross-examination, he testified his license was suspended before he started working for Employer. (Tr. 31, 41).

At his deposition on May 21, 2003, Claimant testified that on December 11, 1998, he was climbing out of a barge at work when the twenty (20) foot ladder he was on fell over. He did not know how the ladder fell. Claimant testified no one was with him on the barge, but his brothers were working on a different barge at the time of his accident. (EX 1, pp. 24-25, 31). After Claimant fell, his brother Michael came down into the barge; Claimant opined he climbed down a second ladder. Claimant testified he could not move after his fall, and the paramedics had to lift him out in a basket. He went straight to the hospital in St. Charles Parish. *Id.* at 33-35, 37.

Claimant testified he did not stay long at the first hospital before being transferred to West Jefferson Hospital. At West Jefferson, he was treated by Doctors Grimm, Steck, and Crotty. Claimant stated Dr. Crotty treated him for bladder and sexual problems which started after the accident and still bother him.[4] He sees Dr. Crotty every six months. *Id.* at 38-40. Claimant was treated by Dr. Grimm and Dr. Steck for his broken pelvis and injured back, right wrist and forearm. Dr. Grimm performed two operations on his wrist; the latest one was in July 2001. Claimant stopped seeing Dr. Grimm; however, Claimant is still under the care of Dr. Steck, whom he sees once a year or more if necessary. Claimant last saw Dr. Steck on July 17, 2003, when he complained of back

[4] Claimant testified at the hearing that he had seen an urologist for sexual problems before his 1998 accident. (Tr. 43).

pain and muscle spasms in his leg. (Tr. 32-33, 25; EX 1, pp. 41-43). Dr. Steck prescribed Claimant medication for both pain and muscle spasms; Claimant testified he takes the pain medication twice daily, 3 or 4 times per week, and takes the muscle spasm medication once a day, every day; however, the medications make him sleepy. (Tr. 34-35).

At his deposition, Claimant testified he cannot stand for more than 20 minutes or sit longer than 30 minutes before his back stiffens up and he has to lie down. At the hearing, he testified he cannot stand longer than 15-20 minutes, and cannot lay down for long. (EX 1, pp. 45-46; Tr. 36). Claimant testified he takes his medication only as needed, when his pain level reaches an eight out of ten; on a good day he has no pain. Claimant has two or three good days per week, although he also testified he has more good days than bad. (EX 1, pp. 48-49). Claimant further testified he is unable to walk far and feels like he walks crooked or off-balance. He has not been jogging or running since his accident, and the only stairs he attempted to climb were at the functional capacity evaluation; Claimant testified he could not climb an entire flight of stairs. (Tr. 46-48; EX 1, pp. 51-53). Claimant stated he had problems completing his functional capacity evaluation. Specifically, his back hurt after climbing stairs and a ladder, although his pain level was only a four out of ten and he did not have to lie down. Claimant testified his back hurt when he tried to bend and touch his toes while standing. Claimant cannot squat because his balance has not been good since his work-related accident. (EX 1, pp. 54-58). Claimant testified that right after his accident he had problems lifting medium-weight items, such as a gallon of milk, but that surgery fixed his wrist problems, and now he does not have trouble lifting. (*Id.* at 61; Tr. 50).

On cross-examination, Claimant testified Dr. Steck never told him he could perform jobs found by Employer's vocational counselor. Nor did he recall Dr. Steck releasing him to medium duty work. Claimant testified he has not worked or applied for a job since his accident; he believes he is not capable of doing any work. Claimant stated Dr. Steck did not release him to work, but told him he was not capable of returning to work. (Tr. 37-38; EX 1, pp. 44-45). Specifically, Claimant believed he was incapable of working because of his back injuries. He did not recall reviewing the results of his functional capacity evaluation. Claimant remembered meeting with Allen Crane, a vocational counselor, but testified he did not receive a list of jobs from Crane. (Tr. 38-40).

Claimant testified he began receiving Social Security disability benefits about two years before his 1998 work accident. (Tr. 44). He applied for Social Security because his back hurt and he felt he could not work; the SSA sent him to a doctor and determined benefits were appropriate. However, Claimant stated he was never actually treated for a back injury. Since his injury, he has received $552 per month from Social Security. (Tr. 44; EX 1, pp. 61-68). Claimant also testified he did not recall any prior work-related accidents and had not been in any accidents since December 11, 1998. Claimant did not

go to the doctor before December 1998 because he rarely got sick. Further, Claimant testified he was never convicted of a crime nor pled guilty to a crime. (EX 1, pp. 69-70). Claimant testified he lived with his sister and helped her with yard work; he then testified he lived with his girlfriend and did not help out with the chores. He clarified at his deposition that he moved in with his sister while he looked for a house, and his girlfriend also lived with them. He stated he tried to help his mother out around her house, but mostly stayed at home during the day and watched television. (Tr. 48, 50; EX 1, p. 71).

C. Testimony of John Exner

Exner is Employer's claims adjuster assigned to Claimant's file in the fall of 2001. He makes decisions regarding the pay of benefits, indemnity and medical expenses. He testified there is no dispute that Claimant fell from a ladder at work. Exner stated Employer paid permanent partial disability benefits from the date of the accident, December 11, 1998, until June 20, 2000, and stopped upon a showing of suitable alternative employment.[5] Permanent partial disability benefits were also paid out on July 26, 2000, based on a 9% impairment rating to Claimant's right arm. (Tr. 10-15).

Exner testified there is no dispute that Claimant is permanently disabled. He received Dr. Steck's letter dated March 7, 2001, in which he opined Claimant is 100% disabled. However, Exner stated he thought there was no medical evidence supporting such an opinion, and that this determination should be left up to a vocational expert. He specified Dr. Steck had approved alternate jobs for Claimant but thought Claimant would have difficulty finding a job based on his illiteracy. (Tr. 16-18). Since Dr. Steck approved jobs for Claimant in May 2000, and there was no loss of earning capacity between the jobs and Claimant's position with Employer, compensation benefits were terminated; they were not reinstated upon Dr. Steck's change of opinion that Claimant was 100% disabled. There has been no labor market survey conducted since May 2000 and Claimant has not received any vocational rehabilitation since June 2000. (Tr. 19-20).

On cross-examination, Exner testified Claimant did not request a review of his PPD status. The FCE recommended by Dr. Steck, and performed on May 6, 2000, indicated Claimant was capable of medium duty work. Exner stated Dr. Steck only mentioned Claimant could not return to work because he could not read; no other reason was given for Claimant's disability. Exner also testified Dr. Steck approved the jobs located by Employer's vocational counselor. (Tr. 20-22).

[5] Employer stipulated that it paid Claimant temporary total disability benefits during this time period. Since a disability cannot be partial until suitable alternative employment is established, I find the stipulation controls over Exner's testimony.

D. Exhibits

(1) Deposition and Medical Records of John C. Steck,, M.D.

Dr. Steck testified by deposition on August 25, 2003. He is a neurosurgeon who began treating Claimant on December 11, 1998, when he was admitted to West Jefferson Hospital for an injury. (EX 2, p. 5). Claimant was admitted with complaints of right arm pain, severe low back pain and bilateral foot numbness. A pelvic CT showed a widened S1 joint and a lumbar CT revealed a burst fracture at L1, with minimal canal compression. A lumbar MRI revealed similar findings, with contusion within the conus. Dr. Steck initially diagnosed Claimant with a L1 burst fracture. When Claimant did not improve with conservative pain management, Dr. Steck performed a decompression and stabilization on December 23, 1998. During rehabilitation, Claimant complained of weakness in his lower extremities and problems with his bladder control. (CX 4, pp. 24-25; EX 2, p. 6). At a January 28, 1999, follow-up appointment, Dr. Steck noted Claimant was recovering well, but there was no significant improvement. Claimant used a back brace and walker, and wore a cast on his right arm. (CX 4, p. 23). Dr. Steck next saw Claimant on April 14, 1999, at which time he noted Claimant had normal leg strength and was improving neurologically. X-rays indicated his spinal fracture was healing. (CX 4, p. 22). On July 15, 1999, x-rays of Claimant's back showed a solid fusion without change. Claimant experienced episodic back pain, but was doing well overall. Dr. Steck noted normal strength and reflexes in Claimant's lower extremities. (CX 4, p. 21).

Claimant returned to Dr. Steck for a follow-up on January 7, 2000. Dr. Steck noted he was doing well and had normal strength and reflexes. X-rays indicated a solid fusion with nice spinal curve. However, Claimant was experiencing sexual dysfunction as a result of the accident. Dr. Steck opined Claimant was unable to return to work cleaning barges, and accordingly recommended he start vocational rehabilitation. He told Claimant to return in one year. (CX 4, p. 20). At his deposition, Dr. Steck testified he did not recall sending Claimant to an FCE, although upon reviewing the FCE reports dated May 6, 2000, he acknowledged the report released Claimant to medium work. Dr. Steck agreed that theoretically Claimant could perform medium duty work. However, Dr. Steck only uses the FCE as a guide, and emphasized that Claimant has neurological and postural deficiencies, is uneducated and has only performed physical work in the past. (EX 2, pp. 8-10).

Claimant returned to Dr. Steck on June 22, 2000, complaining of increasing pain in his left hip. Dr. Steck arranged for x-rays to be taken of the left hip, and prescribed physical therapy for Claimant's left hip and back. He advised Claimant to return six weeks later, but no such visit is evidenced in the record. (CX 4, p. 19). Claimant followed-up with Dr. Steck on November 6, 2000, presenting with increased low back

pain which was centered below the fusion. Dr. Steck did not find any neurological deficiencies and noted Claimant had good strength in his lower extremities. However, because of Claimant's increased symptoms, Dr. Steck ordered another MRI to rule out any degenerative changes. (CX 4, p. 18). The MRI showed the previous L1 burst fracture with slight kyphosis and injury to the conus. At his deposition, Dr. Steck testified kyphosis is a forward angulation of the spine and is not uncommon in the healing of a burst fracture. It can be related to pain because the spine is not in perfect alignment; accordingly, it is typical to have aggravated back pains after a spine fracture. Indeed, Claimant presented on November 27, 2000, with pain in the low back and left hip, along with erectile dysfunction. Dr. Steck diagnosed Claimant as having a healed lumbar injury with persistent neurological dysfunction. He opined in his report that Claimant could return to sedentary work and recommended an FCE to determine his physical capabilities. Dr. Steck testified Claimant reached MMI at this point in time, and any further pain could be managed with over-the-counter medication. (CX 4, p. 17; EX 2, pp. 6-7, 15, 17). In a letter to Employer dated March 7, 2001, Dr. Steck opined Claimant was 100% disabled. (CX 4, p. 47).

At Claimant's July 2, 2001 follow-up appointment, he complained of back pain radiating into his buttocks, but not into his legs. Dr. Steck found Claimant had normal strength, reflexes and sensory abilities. A lumbar MRI and x-rays taken on July 6, 2001, showed no evidence of neural compression and no acute pathology; Claimant had healed completely. (CX 4, pp. 14-15). Dr. Steck next saw Claimant on December 6, 2001, at which time Claimant complained of increased back and left flank pain. Vicodin had not helped, but Dr. Steck did not find any neurological deficiencies. (CX 4, p. 13). On February 22, 2002, Dr. Steck opined Claimant has a significant permanent disability as a result of a lumbar fracture and subsequent spinal cord injury. (CX 4, p. 12). Claimant returned for a follow-up appointment on April 29, 2002, complaining of some increased back pain and left flank pain, but was improving overall. Dr. Steck found him to be neurologically sound. He recommended vocational rehabilitation, but opined Claimant may be rendered non-employable due to his physical restrictions compounded with his limited education. (CX 4, pp. 10-11). Dr. Steck's opinion was the same on November 12, 2002. (CX 4, p. 9).

Claimant returned to Dr. Steck for a follow-up on July 17, 2003. Dr. Steck found Claimant's spinal cord injury left him with chronic low back pain and bladder problems. X-rays showed a stable fusion with slight kyphosis. Dr. Steck testified Claimant's kyphosis will most likely stay the same, and he does not anticipate Claimant will need surgery in the future. However, he did report Claimant suffers from a mild neurological deficit. He opined it is unlikely that Claimant will ever return to physical labor. (CX 4, p. 7; EX 2, p. 18).

At his deposition, Dr. Steck testified Claimant continued to experience weakness in his extremities distally, particularly in his ankles. Claimant could not stand on his toes

and had difficulty elevating his feet or walking on his heels. Additionally, he suffered from urinary and sexual problems. Overall, Claimant healed in an abnormal position and the reality of his getting a job is unlikely. Dr. Steck testified Claimant could probably do light or sedentary work, but it will be difficult considering his education and work history. Claimant cannot return to his job of injury. (EX 2, pp. 11, 16) In his personal experience, Dr. Steck has found most men in a similar situation to Claimant do not return to any type of work. However, he acknowledged that his classification of Claimant as disabled was more subjective than objective; Dr. Steck stated he would respect the opinion of a vocational counselor but would not defer to it. Regarding Crane's letter with available jobs, Dr. Steck testified Claimant theoretically could perform these jobs, but if he complained the jobs aggravated his back injury, Dr. Steck would believe him. The only job Crane identified in May 2000 which Dr. Steck would disapprove of now is the housekeeper position. *Id.* at 13, 18.

(2) Medical Records of Matthew R. Grimm, M.D.

Dr. Grimm is an orthopedic surgeon who began treating Claimant on December 11, 1998, when he was admitted to West Jefferson Hospital. Claimant presented to West Jefferson Hospital with a severely comminuted and open fracture to his right wrist, which Dr. Grimm operated on that same day.[6] The procedure was successful, and Claimant was discharged from the hospital on January 15, 1999. (CX 3, pp. 44, 46-47). Claimant followed up with Dr. Grimm on February 19, 1999. He used a walker for ambulation, although Dr. Grimm switched him to a cane. Additionally, Dr. Grimm prescribed physical therapy to improve range of motion in Claimant's wrist.[7] At Claimant's March 19, 1999 follow-up, Dr. Grimm noted the range of motion in Claimant's wrist and lower extremities was improving and he had no pain in his hip. *Id.* at 15-16. Claimant missed his April 1999 appointment, but followed up with Dr. Grimm on May 26, 1999. Dr. Grimm noted Claimant's pelvis healed and his wrist was healing nicely; he opined Claimant was approaching MMI. In a letter to Employer, dated May 28, 1999, Dr. Grimm stated Claimant may not be able to return to heavy duty work. *Id.* at 7, 17.

Claimant followed-up with Dr. Grimm on June 18, 1999, complaining of some pain in his wrist and back. Claimant still used a cane for ambulation, although x-rays indicated his fractures healed well. Dr. Grimm opined Claimant reached MMI in his wrist. However, he noted Dr. Steck's lumbar spine treatment will determine the limiting

[6] Claimant also presented with a fractured pelvis, which Dr. Steck repaired in performing a stabilization of the lumbar spine. (CX 3, p. 47).

[7] Claimant's occupational therapy progress note of March 18, 1999, indicates he attended eight of twelve therapy sessions. His wrist was tender but exhibited good strength. Claimant's physical therapist, Michelle Distefano, recommended continued therapy to improve his range of motion, strength and functional use. (CX 3, p. 77).

factors for Claimant's return to work. *Id.* at 19. On September 27, 1999, Claimant presented to Dr. Grimm with pain in his right wrist, but denied any intervening trauma. Dr. Grimm opined he may need to remove Claimant's hardware, but that he would approach this slowly. He prescribed physical therapy for Claimant's wrist. *Id.* at 20. Claimant returned on October 28, 1999, with intermittent pain in his wrist. Dr. Grimm opined Claimant had problems with his wrist plate, and indicated it may need to be removed. *Id.* at 21.

In a letter dated July 5, 2000, Dr. Grimm opined Claimant had a 9% impairment to his upper extremity, resulting in a 5% total body impairment. However, he was hesitant in assigning this impairment rating as he had not seen Claimant in eight months. *Id.* at 23. Claimant returned to Dr. Grimm on August 24, 2000, with complaints of wrist pain and swelling. His hardware was unchanged. Claimant did not return to Dr. Grimm until June 27, 2001, at which time he presented with wrist pain and crepitus as a result of his tendons rubbing against the metal plate. Dr. Grimm recommended removing the hardware in Claimant's wrist, which he did on July 13, 2001. *Id.* at 24-25. On July 23, 2001, he stated Claimant was doing well and recovering nicely from the hardware removal. Dr. Grimm reported that Claimant reached MMI a second time with respect to his upper extremity on August 22, 2001. *Id.* at 26-27.

Dr. Grimm followed up with Claimant on October 7, 2003, noting intermittent problems with his wrist during weather changes. Dr. Grimm found very minor, if any, degenerative changes on Claimant's x-rays. On November 12, 2003, he assigned an 11% impairment rating to Claimant's right upper extremity. (CX 3, pp. 80-81).

(3) Medical Records of Karen L. Crotty, M.D.

Dr. Crotty is an urologist who treated Claimant for his urinary and sexual problems secondary to his work-related accident and pelvis fracture. During his stay at West Jefferson Hospital, Claimant developed urinary retention and Dr. Crotty operated on him on January 5, 1999. Her post-operative diagnosis was that Claimant had a neurogenic bladder. (CX 2, p. 4). At Claimant's July 22, 1999 follow-up appointment, Dr. Crotty noted his bladder was still neurogenic post-operatively, and his complaints were essentially the same. He also complained of erectile dysfunction, informing her that the full dose of Viagra was not working.[8] She prescribed medication and instructed him to return in two months; however Claimant did not keep his appointment. He returned for a follow-up appointment on October 12, 2000, at which time Dr. Crotty opined his neurogenic bladder had resolved. *Id.* at 1-2. Dr. Crotty saw Claimant again on June 14, 2001, noting minimal progress in his bladder problems and continued erectile

[8] It appears that Dr. Crotty did not originally prescribe Viagra to Claimant, and it is unclear if this was a pre-existing condition or a result of his December 11, 1998 work-related accident.

dysfunction. She prescribed more medication and instructed Claimant to return for a follow-up every six months. *Id.* at 3. The record does not contain any evidence of further appointments.

(4) Deposition and Vocational Rehabilitation Records of Allen Crane

Crane testified by deposition on October 9, 2003. He has been a licensed vocational rehabilitation counselor since 1992 and was offered and accepted by the parties as an expert witness in his field. (EX 6, pp. 1, 4-5). Crane met Claimant on only one occasion, March 10, 2000, to complete a vocational assessment and establish Claimant's physical abilities and restrictions. As part of the assessment, Crane gave Claimant the Slossen Intelligence Test Revised which is a single-scale assessment of intellectual function and potential for learning. Crane testified that under Louisiana state law vocational counselors are allowed to give single-scale intelligence tests. However, he erroneously testified that Claimants score of 69 places him in the borderline mentally handicapped category.[9] *Id.* at 5-8.

In reviewing Claimant's education and job history, Crane noted Claimant had never been arrested or convicted of a crime. Claimant was collecting $217 per week in worker's compensation and $460 per month in Social Security disability benefits. Claimant's prior jobs included rigger helper and car washer. He was absent from the labor force from 1986-1992 and again from 1995-1998. (EX 5, pp. 45-46). However, Claimant's Social Security earnings records indicate he was employed by Dunparp Engineered Form Co. in 1997 and Big Stuff Quick Stop in 1998. (CX 11, p. 2).

As part of the vocational assessment, Crane reviewed Claimant's medical records from Dr. Grimm and Dr. Steck, indicating he had been treated for orthopedic injuries secondary to a work-related accident in December 1998. Crane specifically pointed out that Dr. Steck's records noted Claimant would have significant physical restrictions related to his lumbar injury and that vocational counseling was recommended because Claimant could not return to his prior job. (EX 6, pp. 9-10). Crane met with Dr. Steck on March 31, 2000, to clearly delineate Claimant's abilities. He testified Dr. Steck opined Claimant was at MMI, recommended a functional capacity evaluation and stated there is no medical reason for Claimant to use a cane. *Id.* at 10; EX 5, p. 10.

Crane testified the subsequent FCE performed on Claimant was valid with no symptom exaggeration, and suggests Claimant is capable of medium level work.

[9] I take judicial notice of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Ed. (DSM-IV), which classifies an IQ of 50-55 to approximately 70 as mild mental retardation. DSM-IV, 46 (1994).

Specifically, the FCE restricted Claimant from excessive repetitive lumbar flexion and rotation, repetitive squatting, prolonged walking and climbing, whole body vibration, operating heavy equipment and limited lifting between 20 and 78 pounds. (EX 5, pp. 121-122). In conducting his labor market survey, Crane considered Claimant's past work history and education which restrict him to either semi-skilled or unskilled work. Crane identified jobs within this category and sent their descriptions to Claimant and his attorney.[10] He also offered Claimant further assistance and information to seek out these jobs. Crane was not aware of whether Dr. Steck commented on the jobs, but he testified Dr. Steck approved the jobs on April 5, 2000. (JX 1, pp. 11-14, 16-17). The jobs were as follows:

Position	Location	Description	Pay
Assembler/ Production Worker	New Orleans	Light duty: frequent standing, occasional walking and lifting 5-20 pounds.	$5.15
Housekeeper	New Orleans	Light duty: frequent standing and walking; occasional sitting and bending; lifting up to 20 pounds	$6.25
Production Worker	New Orleans	Sedentary: seated position	$5.25-$7.00
Courier	Kenner	Pick up and deliver documents; Occasional lifting up to 20 pounds	$7.50-$12.00
Inventory Counter	Metairie	Light duty: frequent alternate sitting and standing; occasional walking, stooping and climbing a 3-step ladder, maximum lifting of 20 pounds; Claimant would drive to display sites and count inventory.	$7.00

(EX 5, pp. 12-14). Crane testified his job developer, Stephanie Hopp, followed up with each employer in June 2000, and found that each was still hiring at that time. As of June 19, 2000, Claimant had not applied for any of the positions. Crane also stated he did not know how much these jobs paid in December 1998, but opined they were around minimum wage, or about $4.95 per hour. (EX 6, pp. 15, 19, 24-26; EX 5, p. 11).

[10] Crane testified the certified letter with the jobs and their descriptions was received by Betty Sylvester on June 1, 2000. (EX 6, p. 13).

On cross-examination, Crane testified he only met with Claimant once and his last involvement with the file was his report of May 31, 2000. Crane testified he knew Claimant's driver's license was suspended at the time of his job search, but was told Claimant had access to reliable transportation and would pay off the tickets if he had the money to do so. However, Crane admitted Claimant would have a difficult time securing the inventory and courier jobs without his driver's license. (EX 6, pp. 18, 20, 28-32). Nonetheless, Crane testified he felt the jobs identified were all within Claimant's educational, vocation, functional and physical limitations. With minimal training, Claimant's transferable skills would allow him to do all these jobs. *Id.* at 27, 35-36.

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he is entitled to temporary total disability until he reached MMI on December 11, 2000, or July 12, 2001, if stipulated. Thereafter, he is entitled to permanent total disability benefits because Employer failed to establish suitable alternative employment. Claimant contends none of the jobs listed were suitable, realistic or available in light of the fact he is illiterate, mentally handicapped, did not have a driver's license and did not have any formal job training. Furthermore, Claimant asserts the jobs were not within his geographic location of Marrero, Louisiana. If suitable alternative employment is established, Claimant alternatively asserts he is entitled to permanent partial disability based on a loss of wage earning capacity and what the listed jobs were paying in December 1998 at his time of injury. Additionally, Claimant contends he is entitled to permanent partial disability for an 11% impairment rating to his right upper extremity.

Employer contends Claimant is not entitled to permanent total disability because the FCE performed in March 2000 indicates he is capable of performing medium duty work. It asserts it has established suitable alternative employment as of June 20, 2000. Employer argues Claimant's testimony at his deposition that he has more good days than bad indicates his pain does not keep him from working. Although Claimant did not have a driver's license in June 2000, Employer asserts that was a temporary and changeable situation which could have been resolved by his paying his traffic tickets. Moreover, Employer pointed out that Claimant's license was suspended while he was working at Employer, 35 miles from his home in Marrero. Moreover, the jobs listed were in New Orleans, Metairie and Kenner, no more than 22 miles from Claimant's home in Marrero. As such, Employer asserts the jobs were within his geographic location.

B. Nature of Claimant's Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10)(2003). Disability is an economic concept based upon a medical foundation distinguished by either its nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649(5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407(1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157(1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91(1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56(1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). A prognosis that further surgery may be necessary at an unspecified date in the future does not preclude a finding of permanency. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986); *Meeke v. I.S.O. Personnel Support Dept.*, 10 BRBS 670, 675-76 (1979). Additionally, "an underlying permanent disability does not disappear during periods of temporary exacerbation." *Leech*, 15 BRBS at 22.

In the present case, the parties do not dispute Claimant sustained a work-related injury on December 11, 1998. Subsequently, he came under the care of Dr. Grimm for his wrist injuries and Dr. Steck for his back and pelvis injuries. On May 26, 1999, Dr. Grimm opined Claimant's wrist was approaching MMI, and he informed Employer that Claimant may be unable to return to heavy duty work. Dr. Grimm opined Claimant reached MMI in his wrist on June 18, 1999. He noted any limiting factors on Claimant's return to work would be determined by Dr. Steck's lumbar spine treatment. Claimant returned to Dr. Grimm on August 24, 2000, with pain related to his wrist plates. The hardware was removed on July 13, 2001 and Dr. Grimm opined Claimant reached MMI in his wrist on August 21, 2001. I find that the pain caused by the hardware in Claimant's wrist was a temporary aggravation of his already permanent wrist injury. The surgery

was not foreseeable in June 1999 when Dr. Grimm found Claimant at MMI. As such, the second surgery did not alter the permanent nature of Claimant's wrist injury. I find Claimant reached MMI in his wrist on June 18, 1999.

Crane's vocational rehabilitation records indicate Dr. Steck opined on March 31, 2000, that Claimant had reached MMI in his lower back. (EX 6, p. 10). However, Dr. Steck testified Claimant did not reach MMI in his back until approximately two years after his injury. This is consistent with his medical report of November 27, 2000, which indicates Claimant's lumbar injury had healed. At this follow-up examination, Dr. Steck released Claimant to sedentary work, but recommended a FCE to determine Claimant's physical abilities. While Claimant continued to complain of low back and left flank pain at future follow-up appointments, Dr. Steck found no neurological changes and noted Claimant was improving overall. Thus, I find, and the record establishes, Claimant reached MMI in his low back on November 27, 2000. Therefore, his temporary back disability became permanent on that date.

C. Extent of Claimant's Disability

1. *Prima Facie* Case of Total Disability

Case law has held that to establish a *prima facie* case of total disability under the Act, a claimant must prove he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, it is undisputed Claimant is unable to return to his former Longshore job with Employer. Dr. Grimm noted on May 26, 1999, that Claimant may not be able to return to heavy duty work because of his wrist injury. On January 7, 2000, Dr. Steck opined Claimant would not be able to return to work as a barge cleaner as a result of his low back injury. He recommended vocational rehabilitation and a functional capacity evaluation. Thus, Claimant has established a *prima facie* case of total disability.

2. Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661

F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To establish suitable alternative employment, an employer must prove the availability of actual employment opportunities within a claimant's geographical location which he could perform considering his age, education, work experience and physical restriction. *Turner*, 661 F.2d at 1042-43; *Edwards v. Director, OWCP,* 99 F.2d 1374 (9th Cir. 1993); *cert. denied* 511 U.S. 1031 (1994). The finder of fact may rely on the testimony of a vocational expert in determining the existence of suitable alternative employment, even if the expert did not examine the claimant, as long as the expert is aware of the claimant's age, education, work experience and physical restrictions. *Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

In the present case, Employer hired vocational rehabilitation counselor Alan Crane in the spring of 2000 to locate suitable alternative employment for Claimant. After meeting with Dr. Steck and conducting a functional capacity evaluation of Claimant's physical abilities in March 2000, Crane searched for jobs in Claimant's geographic area which were in the sedentary-light duty category. Crane found five jobs which fit this description, all within 22 miles of Claimant's home and averaging $6.23 per hour in June 2000. Dr. Steck approved all of the positions April 5, 2000, although he revoked his approval of the housekeeper position at his deposition in May 2003.

Claimant contends the remaining four jobs do not amount to suitable alternative employment. He argues they are not suitable because his driver's license was suspended, making it burdensome for him to travel to the job sites. In particular, Claimant would be unable to perform the duties of the courier and inventory taker positions as they require extensive travel to different locations. Indeed, Crane testified the courier position may not be appropriate for Claimant considering he did not have a driver's license in June 2000. When determining a claimant's ability to return to work and overall disability, both his injury and background must be taken into consideration. *Rivera v. United Masonry, Inc.*, 25 BRBS 51, 53 (CRT)(D.C. Cir. 1991). A prior criminal record is considered part of a claimant's background as it can affect his employability. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988)(a bank guard position did not constitute suitable alternative employment because it was not realistically available to a claimant with a criminal record); *Piunti v. I.T.O. Corp. of Baltimore*, 23 BRBS 367 (1990). However, legal impediments to a claimant's employability which arise after the work-related accident cannot be considered in the establishment of suitable alternative employment. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123, 125-26 (1998)(holding that where Claimant's driver's license suspended for five years following his work-related injury but prior to identifying suitable alternative employment, driving position were considered suitable); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987)(claimant's post-injury incarceration does not preclude an award of total disability if the employer cannot establish suitable alternative employment during the period of incarceration); *Allen v. Metropolitan Stevedore*, 8 BRBS 366 (1978)(same).

At the vocational assessment on March 10, 2000, Claimant stated his license had been suspended for approximately four years and would be eligible for reinstatement sometime in 2001.[11] Thus, Claimant's license was suspended sometime around 1996, before he started working for Employer. As such, the suspension is considered part of his background and must be considered when locating suitable alternative employment. The issue is whether the jobs located by Crane are available to and suitable for someone whose driver's license was suspended. Crane testified the courier job was not suitable, and I agree. It is highly improbable that Claimant could have performed the job duties of picking up and delivering packages utilizing public transportation. Similarly, Crane admitted Claimant would likely have difficulty securing the inventory-counter position without a driver's license. I find it would be complicated for Claimant to perform the duties of this job via public transportation, and the employer would be unlikely to hire Claimant without a driver's license. Thus, I find the inventory-counter position unsuitable for Claimant. The remaining suitable alternative positions identified by Crane are the assembler and production worker jobs in New Orleans. Nothing in the record indicates Claimant's suspended license would affect his ability to perform these jobs. Although Claimant asserts he cannot travel to the job locations because of his suspended driver's license, I do not find that to be the case. New Orleans is accessible from Marrero on the public transportation system. Moreover, Claimant worked at Employer's facility almost 35 miles away from his home while his driver's license was suspended. If he can travel to a job 35 miles away, absent public transportation, I find it reasonable for Claimant to travel to a job approximately 8 miles away. Thus, the production worker and assembly positions constitute suitable alternative employment.

Claimant also contends the jobs are not within his geographic location. One requirement of suitable alternative employment is that it be within Claimant's "local community." *Turner*, 661 F.2d at 1042-43. This local community can be either where the accident occurred, or where the Claimant resided at the time of the accident. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). Claimant was injured at Employer's facility in Edgard, Louisiana. At the time of the accident Claimant was, and still is, residing in Marrero, Louisiana. Edgard is approximately 35 miles from Marrero. The remaining suitable jobs identified by Crane were located in New Orleans, approximately 8 miles from Marrero. The jobs were approximately 40 miles from Edgard. Thus, the jobs identified are actually closer to Claimant's home than Employer's facility. As such, I find the jobs are within Claimant's "local community" and cannot be considered unsuitable on this ground.

Claimant also contends the jobs are unavailable to him because he is illiterate and has had no formal job training in the past. However, in his vocational assessment Crane concluded, and the record establishes, Claimant was capable of performing unskilled and

[11] Claimant's driver's license was indeed re-issued to him on February 1, 2001. (EX 1, p. 75).

semi-skilled work. Specifically, Claimant's work at Employer and at International Consulting was considered semi-skilled. The record indicates Claimant is capable of learning new skills and performing semi-skilled work. Therefore, despite his limited education, I find the production worker and assembly positions are suitable and available to Claimant.

The Fifth Circuit has held that a single job may constitute suitable alternative employment if the claimant has a reasonable likelihood of obtaining it "under appropriate circumstances." *P&M Crane Co.*, 24 BRBS at 121; *Turner*, 661 F.2d at 1043; *Stout v. Equitable/Halter Shipyard, Inc.*, BRB No. 03-0266 (December 12, 2003)(*unpublished*)(a single job opening may constitute suitable alternative employment if there is a reasonable likelihood the claimant could obtain the job). In the present case, Employer has identified two specific jobs which are suitable for Claimant in light of his education, work experience and physical restrictions. Both of the jobs are production worker/assembly positions. Nothing in the record suggests Claimant could not secure these jobs, as neither requires any experience or prior training. (EX 5, pp. 29-30). I find there is a reasonable likelihood Claimant could secure these positions; as such, Employer established suitable alternative employment.

3. Claimant's Diligence

A Claimant can overcome suitable alternative employment and be considered totally disabled only by showing he diligently tried and was unable to secure the work located by the employer. *Hairston*, 849 F.2d at 1096. Specifically, the claimant must show reasonable diligence in attempting to secure jobs identified by the employer as attainable and available; the claimant also must establish a willingness to work. *Turner*, 661 F.2d at 1043. In the present case, Employer established suitable alternative employment; however, Claimant did not apply for any of the jobs identified by Employer. Claimant testified he did not apply because he never received the job listings. However, certified mail receipts submitted into evidence show Employer mailed the job listings to Claimant on June 1, 2000, and said letter was received by Betty Syl.[12] Employer resent the job descriptions two weeks later, this time Claimant signed for the letter on June 17, 2000. Employer also sent the job descriptions to Claimant's attorney. (EX 5, pp. 21-24). Thus, the record establishes that Claimant did indeed have possession of the jobs identified by Employer and the employers were still hiring in mid-June 2000. Claimant's failure to apply for the jobs demonstrated a lack of diligence in attempting to return to work. Of notable importance, Claimant was previously absent from the work force for long periods of time without an explanation, and he also received Social

[12] The receipt does not show when the letter was actually received. Additionally, Claimant testified his girlfriend's name is Betty Sylvester, and I find it reasonable to conclude she is the "Betty Syl" who signed for the letter. (EX 5, p. 31).

Security disability benefits. This supports Employer's argument Claimant was unwilling to work. In conclusion, Claimant has failed to show he diligently sought the suitable alternative employment. As such, I find Claimant is partially disabled as of June 17, 2000.

D. Entitlement to Compensation

1. Total Disability Awards

Section 8 of the Act mandates a claimant must be compensated according to the magnitude and duration of his disabilities. Where a Claimant suffers multiple injuries from one accident, his total compensation must not exceed the amount payable in the event of total disability, or 2/3 of his pre-injury average weekly wage. *I.T.O. of Baltimore v. Green*, 185 F.3d 239, 243 (4th Cir. 1999) (stating that "[i]n no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability"); *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 421 (9th Cir. 1995)(providing that the combined payment of dual awards cannot exceed the statutory limit set forth in Section 8(a) for permanent total disability benefits). However, a totally disabled claimant is entitled to a minimum compensation rate of the lesser of his pre-injury average weekly wage or 50% of the National Average Weekly Wage. § 906(b)(2); *Director, OWCP, v. Bath Iron Works Corp.*, 885 F.2d 983, 991 (1st Cir. 1989). In December 1998, the minimum compensation rate for total disability was $217.94. *See* U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, *at* http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (visited January 7, 2004).

In the present case, Claimant suffered multiple injuries from his December 11, 1998 work-related accident. Claimant's multiple injuries resulted in overlapping periods of disability, set forth in the table below.

Time Period	Event	Disability (Wrist)	Disability (Back)
Dec. 11, 1998-June 18, 1999	Accident (Dec. 11, 1998)	Temporary Total	Temporary Total
June 19-1999-June 17, 2000	Wrist MMI (June 18, 1999)	Permanent Total	Temporary Total
June 18, 2000-Nov. 27, 2000	SAE established (June 17, 2000)	Permanent Partial	Temporary Partial
Nov. 28, 2000, continuing	Back MMI (Nov. 27, 2000)	Permanent Partial	Permanent Partial

In light of the multiple periods of total disability and the maximum amount of compensation available to Claimant, I find he is entitled to temporary total disability benefits from the date of his accident, December 11, 1998, through June 18, 1999, at which time he reached MMI in his wrist. Thereafter, Claimant is entitled to permanent total disability benefits from June 19, 1999 through June 17, 2000.[13] Based on Claimant's stipulated average weekly wage of $303, his corresponding compensation rate for total disability would be $202.10. I find Claimant is entitled to the minimum compensation rate of $217.94 in accordance with § 906(b)(2) of the Act.

2. Partial Disability Awards

The Act compensates claimants for permanent partial disability in one of two ways. If the injury is included in the list of "scheduled injuries" found in §§ 908(c)(1)-(20), the claimant is entitled to 2/3 of his average weekly wage for the specified number of weeks in the relevant section, regardless of whether his wage earning capacity was impaired. For all other "unscheduled injuries" a claimant is compensated under § 908(c)(21), entitling him to 2/3 of the difference between his pre-injury average weekly wage and post-injury wage earning capacity. The schedule was set up to ease the administrative burden of computing a claimant's wage earning capacity for specific injuries and a claimant cannot elect the 8(c)(21) unscheduled compensation if the injury falls within the schedule. *Potomac Elec. Power Co. (PEPCO) v. Director, OWCP,* 449 U.S. 268, 274 (1980); *Pool Co. v. Director, OWCP,* 206 F.3d 543, 34 BRBS 19, 20 (CRT)(5th Cir. 2000). When a scheduled benefit is combined with an award under Section 8(c)(21), however, the Section 8(c)(21) benefits must be paid in full from the beginning of the award period and the remaining scheduled benefits should be adjusted over the proper number of weeks so that the claimant may receive the full benefit of both awards without exceeding his maximum compensation rate of what he would be entitled to in the event of total disability.[14] *Green*, 185 F.3d at 243.

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[13] In accordance with the benevolent nature of the Act, I award Claimant permanent total disability for this time period to allow him to benefit from the cost of living increases set forth in § 910(f) for such disability. Although Claimant was permanently totally disabled only from his wrist and not his back, I find he is nonetheless entitled to the increase. Absent any back injury the increase would go into effect, and the existence of his back injury should not diminish Claimant's compensation for his wrist injury.

[14] In *Green*, the claimant's pre-injury average weekly wage was approximately $600.00. The clamant suffered a scheduled ankle injury, entitling him to 51.25 weeks of compensation, and he suffered a shoulder injury, compensated under Section 8(c)(21) based on a residual wage earning capacity of $305.00 per week. Thus, if both benefits were paid concurrently, the claimant would receive approximately $400.00 per week for his ankle injury, and approximately $200.00 per week for his shoulder injury, which exceeded any entitlement to permanent total disability. Id. The Fourth Circuit determined that the statute required the claimant's Section 8(c)(21) award to be paid in full from the beginning of the award period ($200.00 per week), and it reduced the

In the present case, Claimant's wrist injury falls under the schedule set forth in § 908(c)(1) but his back is an unscheduled injury falling under § 8(c)(21). Both of these injuries became partial in extent on June 17, 2000, when Employer established suitable alternative employment. On that date, Claimant became temporarily partially disabled from his back, entitling him to disability benefits under § 908(e). He was also permanently partially disabled from his wrist, entitling him to concurrent benefits under the schedule in § 908(c)(1).

Pursuant to *Green*, Claimant is entitled to the full amount of temporary partial and permanent partial disability compensation for his back. Under an award for partial unscheduled disability the claimant's post-injury wage earning capacity must be adjusted for inflation to represent the wages that the post-injury job(s) paid at the time of the claimant's injury. § 908(e), *accord*, § 908(c)(21); § 908(h) (2001). *See also Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 n.4 (1996), *aff'd on other grounds*, 203 F.3d 664 (9th Cir. 2000)(stating calculating for inflation "insures that a claimant's wage earning capacity is considered on equal footing with the determination under Section 10 of average weekly wage at the time of injury"); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002)(stating the Act contemplates the current dollar amount of wage earning capacity be adjusted back in time to account for post-injury inflation and general wage increases); *LaFaille v. Benefits Review Board, U.S. Dept. of Labor*, 884 F.2d 54 (2nd Cir. 1989)(requiring the Board to express its finding "of the residual wage earning capacity in terms of the time-of-injury equivalent of the residual earnings, since general wage increases and inflation would otherwise distort the comparison required under § 8(c)(21)); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986)*; Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). If there is no evidence of the earning potential of the particular job at the time of a claimant's injury, the necessary adjustment may be made by decreasing the claimant's earnings in the suitable alternative employment by the increases in the National Average Weekly Wage (NAWW) since the date of the injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 331 (1990).

In the present case, Employer established suitable alternative employment by locating two jobs which paid $5.15 and $5.25 per hour, for an average of $5.20 per

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total amount of weekly compensation payable due to the claimant's ankle injury to $200.00 per week (the difference between the claimant's maximum weekly compensation benefit and his award under Section 8(c)(21)), but extended the number of weeks the scheduled award was payable from 51.25 to 102.5, so that Claimant received his full benefit under the statute. Id. at 242-43.

hour.[15] As Employer did not establish suitable alternative employment until June 17, 2000, it is necessary to determine what these jobs were paying at the time of Claimant's injury in December 1998. While there is no affirmative evidence establishing this, Crane opined in his testimony that the jobs probably paid minimum wage in 1998, somewhere around $4.95 per hour. According to the Minimum Wage Increase Act of 1996, the minimum wage in 1998 was actually $5.15 per hour. 29 U.S.C. § 206(a)(1) (2000). Between December 1998 and June 2000, there was a 3.39% increase in the NAWW. *See National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, *at* http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm. Decreasing the wages for the suitable alternative employment, $5.20 per hour, by this percentage would result in an amount less than the minimum wage. Therefore, I find Claimant's wage earning capacity immediately following his injury was $5.15 per hour. This results in $206 for a 40 hour week, and a loss of wage earning capacity for Claimant in the amount of $97 per week. As such, I find Claimant is entitled to temporary partial disability benefits under § 908(e) in the amount of $64.70 per week, beginning on June 18, 2000, and permanent partial disability benefits under § 908(c)(21) in the same amount beginning on November 28, 2000 and continuing.

Claimant is also entitled to concurrent permanent partial disability for his wrist under § 908(c)(1). The schedule mandates that for a loss of use of an arm, a claimant is entitled to 2/3 of his average weekly wage for 312 weeks. § 908(c)(1). In the case of partial use of a member, according to § 908(c)(19), a claimant's scheduled compensation must be proportionate to the actual impairment. Here, Dr. Grimm opined Claimant suffered an 11% loss of use to his right upper extremity. Thus, Claimant is entitled to receive 2/3 of his pre-injury average weekly wage for a total of 34.4 weeks, which represents 11% of the maximum 312 weeks. In total, Claimant is entitled to $6,932.03 in compensation under the schedule, or $202.10 per week for 34.3 weeks. However, this scheduled award must be modified so Claimant's total compensation payments, scheduled and unscheduled, do not exceed what he would be entitled to for total disability, in this case the minimum compensation rate of $217.94 per week. Accordingly, I find that beginning June 18, 2000, Claimant is entitled to receive $153.24 per week for 45.24 weeks under the schedule, concurrent with his unscheduled compensation of $64.70 per week.

[15] Although the assembly production worker position only started at $5.25 per hour with the possibility of earning up to $7.00 per hour after training, the evidence does not indicate exactly how much of an increase, if any at all, Claimant would receive. For this reason, I have used the base pay rate of $5.25 per hour in calculating Claimant's post-injury wage earning capacity.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Sections 908(b) and 906(b)(2) of the Act for the period from December 11, 1998, to June 17, 1999, based on a stipulated average weekly wage of $303.00 and a minimum compensation rate of $217.94.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Sections 908(a) and 906(b)(2) of the Act for the period from June 18, 1999, to

June 17, 2000, based on a stipulated average weekly wage of $303.00 and a minimum compensation rate of $217.94.

3. Employer shall pay to Claimant temporary partial disability benefits pursuant to Section 908(e) of the Act for the period from June 18, 2000, to November 27, 2000, based on a stipulated average weekly wage of $303.00, an adjusted residual wage earning capacity of $206.00 per week and a corresponding compensation rate of $64.70.

4. Employer shall pay to Claimant permanent partial disability benefits pursuant to Section 908(c)(21) of the Act for the period from November 28, 2000 and continuing, based on a stipulated average weekly wage of $303.00, an adjusted residual wage earning capacity of $206.00 per week and a corresponding compensation rate of $64.70.

5. Employer shall pay to Claimant permanent partial disability benefits pursuant to Section 908(c)(1) of the Act beginning on June 18, 2000, in the amount of $153.24 per week for 45.24 weeks, for a total of $6,932.03.

6. Employer shall be entitled to a credit for the temporary total disability compensation paid to Claimant under Section 908(b) of the Act from December 11, 1998 through June 20, 2000, and for the permanent partial disability compensation paid to Claimant under Section 908(c)(1) of the Act.

7. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

8. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

9. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE